No. 93-670 (4)

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1993

ALBERT HOWLETT,

Petitioner,

vs.

BIRKDALE SHIPPING CO., S.A.,

Respondent.

On Writ of Certiorari To The
United States Court of Appeals
for the Third Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 28, 1993
CERTIORARI GRANTED JANUARY 10, 1994

58 pp

TABLE OF CONTENTS

Page

1. Relevant Docket Entries - United States Court of Appeals for the Third Circuit 1

2. Relevant Docket Entries - United States District Court for the Eastern District of Pennsylvania . . . 3

3. Excerpts from Deposition of Albert Howlett 5

4. Excerpts from Discovery Deposition of Captain Daniel Cafena Campos 19

5. Excerpts from De Bene Esse Deposition of Captain Daniel Cafena Campos 30

6. Excerpts from Deposition of Raymond McMullen 36

7. Excerpts from Deposition of Joseph Fisher 39

8. Opinion of the United States District Court for the Eastern District of Pennsylvania dated October 1, 1992 42

9. Order of the United States District Court for the Eastern District of Pennsylvania dated October 1, 1992 47

10. Order Entering Judgment of the United States District Court for the Eastern District of Pennsylvania dated October 2, 1992 48

Page

11. Opinion of the United States District Court for the Eastern District of Pennsylvania dated November 23, 1992 49

12. Order of the United States District Court for the Eastern District of Pennsylvania dated November 23, 1992 51

13. Judgment Order of the United States Court of Appeals for the Third Circuit dated June 30, 1993 52

14. Order of the United States Court of Appeals for the Third Circuit denying Petition for Rehearing in Banc 54

RELEVANT DOCKET ENTRIES

Howlett v. Birkdale Shipping Co., et al.
United States Court of Appeals
for the Third Circuit
Docket No: 92-2043

12/08/92	CIVIL CASE DOCKETED. Notice filed by Albert Howlett.
12/16/92	(POSITIVE) DISCLOSURE STATEMENT on behalf of Birkdale Shipping Co and Empresa Maritima, advising: Birkdale Shipping Co., S.A. is a Subsidiary of Empresa Maritima, S.A., which is a wholly owned subsidiary of the Government of Chile.
01/19/93	BRIEF on behalf of Appellant Albert Howlett, Pages 41, Copies: 10, Delivered by mail, filed. Certificate of service date 1/19/93.
01/19/93	APPENDIX on behalf of Appellant Albert Howlett, Copies: 4, Volumes: 1, Delivered by mail, filed. Certificate of service date 1/19/93.
02/18/93	BRIEF on behalf of Appellee Birkdale Shipping Co, Appellee Empresa Maritima, Pages: 40, Copies: 10, Delivered by mail, filed. Certificate of Service date 2/18/93.
03/04/93	REPLY BRIEF on behalf of Appellant Albert Howlett, Copies: 10, Delivered by mail, filed. Certificate of service date 3/4/93.
06/21/93	ARGUED 6/21/93 Panel: Stapleton, Mansmann and Hutchinson, Circuit Judges.

06/30/93	JUDGMENT-ORDER (Stapleton, Authorizing Judge, Mansmann and Hutchinson, Circuit Judges), AFFIRMED. Costs taxed against appellant, filed.
07/14/93	PETITION by Appellant for rehearing in banc. Certificate of service date 7/14/93, filed.
07/30/93	ORDER filed (Sloviter, Chief Judge, Becker, Stapleton, Authorizing Judge, Mansmann, Greenberg, Hutchinson, Scirica, Cowen, Nygaard, Alito, Roth, Lewis, Circuit Judges) denying petition for in banc rehearing by Appellant Albert Howlett.
08/09/93	MANDATE ISSUED, filed.
11/05/93	Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellant Albert Howlett. Filed in the Supreme Court on 10/28/93 at Supreme Ct. case number: 93-670.
01/14/94	U.S. Supreme Court order date 1/10/94 at S.C. number: 93-670, granting petition for writ of certiorari by Appellant Albert Howlett LIMITED to Question 1 presented by the petition, filed.

RELEVANT DOCKET ENTRIES

Albert Howlett v. Birkdale Shipping Co., S.A.
United States District Court, Eastern District of Pennsylvania
Docket No: 91-CV-7978

12/04/92	1	Complaint
01/31/92	4	Answer to Complaint by DEFENDANT BIRKDALE SHIP CO, Certificate of Service.
07/22/92	18	MOTION BY DEFENDANT BIRKDALE SHIP CO FOR SUMMARY JUDGMENT, MEMORANDUM, CERTIFICATE OF SERVICE.
08/10/92	20	Response by PLAINTIFF ALBERT HOWLETT to MOTION FOR SUMMARY JUDGMENT, Memorandum, Certificate of Service.
08/20/92	22	Reply Brief by DEFENDANT BIRKDALE SHIP CO in support of their MOTION FOR SUMMARY JUDGMENT, Certificate of Service.
10/01/92	24	MEMORANDUM AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT (SIGNED BY JUDGE JAMES M. KELLY) 10/1/92 ENTERED AND COPIES MAILED.
10/09/92	26	MOTION BY PLAINTIFF ALBERT HOWLETT FOR REARGUMENT, MEMORANDUM, CERTIFICATE OF SERVICE.
10/22/92	27	Response by DEFENDANT BIRKDALE SHIP CO to MOTION FOR REARGUMENT, Certificate of Service.

11/02/92 28 Reply by PLAINTIFF ALBERT HOWLETT to response to MOTION FOR REARGUMENT, Certificate of Service.

11/23/92 30 MEMORANDUM & ORDER THAT PLFF'S MOTION FOR REARGUMENT IS DENIED. (SIGNED BY JUDGE JAMES M. KELLY) 11/24/92 ENTERED AND COPIES MAILED.

12/03/92 31 Notice of Appeal by PLAINTIFF ALBERT HOWLETT from the order entered 10/1/92 granting deft's motion summary judgment and judgment order 10/1/92 and order entered 11/23/92.

Excerpts from Deposition of Albert Howlett

[Page 4]

Q. Can you state your full name.

A. Albert Joseph Howlett

* * * * *

[Page 9]

Q. Do you recall the name of the ship your accident occurred on?

A. PRESIDENTE -- I forget. PRESIDENTE something.

Q. The date of your accident, do you recall it to be July 28, 1989?

A. Yes.

* * * * *

[Page 12]

Q. Do you recall what time you got to work that day?

A. It was about quarter of 8:00 in the morning.

Q. Do you recall what time you boarded the vessel?

A. After 9:00. Some time after 9:00.

* * * * *

Q. When you boarded the vessel, where did you go to immediately? Where did you first work?

A. Number 2 hatch.

* * * * *

Q. Do you recall how many people were working in the hatch?

* * * * *

A. Down in the hold of the ship was four.

* * * * *

[Page 14]

Q. Can you tell me what cargo was in the hold at that time and describe it for me?

A. On the after end you had containers and on the forward end you had cocoa beans.

Q. Were there any gaps in the cargo that you could see the skin of the hatch?

A. No.

Q. When you went in there, what did you unload first?

A. Cocoa beans, pre-slung cocoa beans.

Q. What time did your accident occur?

A. I think it was about 10 of 10:00.

Q. So you were in that hatch for less than an hour?

A. Yes.

* * * * *

[Page 15]

Q. At that time before your accident how many drafts were taken out of the hold?

MR. SOVEL: May I interject something. When you take out the pre-slung units, how many units would go out as a draft?

THE WITNESS: Four would go out as a draft. Four makes a draft up.

BY MR. ZIPFEL:

Q. Four hooked up at once makes a draft.

A. I guess about four drafts, four to five drafts.

* * * * *

Q. Did you assist with hooking up those drafts?

A. Yes.

Q. And what were you using to hook them up?

A. It's a spreader. It's a spreader that has four hooks that dangle. Each man gets four hooks to hook in. You have four corners. You hook up four corners, two, three, four, and each man does the same thing.

Q. Each man hooks onto one unit?

[Page 16]

A. Yes, each man hooks up four hooks onto the corners of each.

* * * * *

Q. Did any of those four drafts when they were lifted expose the skin of the hatch?

A. No.

Q. Were you working on top of cargo while you were hooking up those drafts?

A. Which drafts?

Q. The four before your accident.

A. Yes.

* * * * *

[Page 17]

Q. . . . . And what did you have on your feet at that day?

A. Work boots.

* * * * *

Q. Had you ever discharged this type of cargo before?

A. Yes.

Q. And approximately how often?

A. Numerous times.

Q. More than 20?

A. Yes, I imagine more than 20, yes.

Q. More than a hundred?

A. Probably less than a hundred.

Q. Between the time that you entered the number 2 hatch and the time of your accident, did you register any complaints about any condition in the hold?

A. No

[Page 18]

Q. Did you hear anyone else register any complaints?

A. No.

Q. At any time from when you entered the hatch till the time of your accident did you see or have any contact with any officers or crew members?

A. No.

Q. Can you tell me how your accident occurred.

A. I was working cocoa beans in number 2 hatch. We took out about four or five drafts of pre-slung. We were taking the first draft off skin. When we took the first draft off skin, I stepped down to the hold, hit the plastic and went down.

Q. When this draft was being lifted right before your accident, where were you standing?

A. I was facing the after end. I was facing the after end. I would be on the offshore side, on the offshore side.

* * * * *

Q. Were you standing on top of anything?

A. Yes, cocoa beans.

Q. Approximately how high from the skin would you have been standing?

[Page 19]

A. Roughly about 3 foot.

Excerpts from Deposition of Albert Howlett

Q. Were you standing on a draft that would be taken out later?

A. Yes.

Q. And they're only 3 feet high?

A. Yes, about 3 feet high.

Q. Was the draft out of the hold or was it dangling in the air at the time of your accident?

A. It was dangling in the air.

Q. And where were you going to at the time of your accident?

A. The ship had no wing. It didn't have any wings there. So with the containers on the after end there was a little walkway there. There was a little walkway for the lids, you know, for the lids. On the after end the container came up, so the lids was open -- the lid was open. So we had to step up and on the ledge over here. See, there was no wings there to get out of the hold, so you walk to the side around the containers.

Q. You were getting out of the way so --

A. Yes. We walked to the after end to get out.

* * * * *

[Page 24]

Q. The plastic that you mentioned, can you describe where that was.

Excerpts from Deposition of Albert Howlett

A. It was on the skin of the ship, on the deck of the ship.

Q. Can you describe the plastic for me.

A. A thick piece of plastic, that's all.

Q. Approximately how big a piece of plastic was it?

A. The only area showing was the area I took the four out of.

Q. The only area of the skin showing.

A. Yes. You know, well, it went underneath. You can see that it went underneath, but that was it.

Q. So there was plastic covering the entire skin in that area; is that correct?

A. In the area that I fell in, yes.

Q. . . . . So, when that draft was lifted out, am I correct that you couldn't touch the skin within that area where the load had been located?

[Page 25]

A. Without hitting plastic.

Q. So plastic covered the entire area.

A. Yes.

Q. Was it clear plastic or did it have a color to it?

Excerpts from Deposition of Albert Howlett

A. It was a clear plastic. It was dirty. You know, it was cocoa beans.

Q. You said you worked this type of cargo before. Had you ever seen plastic used on the skin of a hatch below cocoa beans like that before?

A. Never.

* * * * *

Q. Before you stepped down from the cocoa beans to the plastic, were you aware that there was plastic there?

[Page 26]

A. No.

Q. When you stepped down from the cocoa beans to the plastic, where were your eyes directed?

A. Where was my eyes directed?

On the draft.

Q. Did you look down at all before you stepped down into --

A. Yes. As I was coming down, yes.

* * * * *

Q. Before you stepped from the cocoa beans down into the space where this draft had been located, at any time did you direct your eyes to what would have been normally the skin?

A. Yes.

Q. When you did that, did you observe the plastic?

Excerpts from Deposition of Albert Howlett

A. No.

Q. Why did you not see the plastic?

A. Well, it was dirty. I guess I really didn't think it was plastic. I really didn't think it was plastic.

Q. What did you think it was?

[Page 27]

A. I thought it was paper.

Q. I don't think I've got a full appreciation of what the plastic looked like. You said it was dirty. Can you describe it any better than that?

A. It was dirty and there was debris on it, you know.

Q. Was it a clear plastic or was it a dark plastic?

A. I guess a dirty piece of plastic. I guess clear. I guess clear.

Q. When you say "dirty," what --

A. From the cocoa beans, just the dirt.

Q. Was there dust on it or was it just dirt?

A. Yes, it was dust, dirt, cocoa beans, you know, the whole bit.

Q. Was it dirty in one area or the entire thing?

Excerpts from Deposition of Albert Howlett

A. It was dirty all over.

Q. Approximately how thick was the plastic?

A. Thin. You know, it's not that thick. Less than a quarter of an inch I know that.

Q. You said you thought it was paper.

A. Yes.

Q. Had you ever seen paper used on the skin of a hatch below cocoa beans before?

[Page 28]

A. All the time.

Q. So is that a normal practice for shipping cocoa beans?

A. Well, you have plywood, you have paper, most of the time you have plywood and paper, you would use dunnage and you'll put paper over the dunnage. But mostly it's plywood or papers.

Q. Are you saying normally there would be plywood and paper?

A. Yes, or something it's not. Normally it's plywood or paper, yes.

Q. Do you know what the paper is there for, what the purpose is for?

A. Yes.

Excerpts from Deposition of Albert Howlett

Q. Can you tell me.

A. Condensation.

Q. When you stepped down from the cocoa beans, did you immediately fall or did you take any steps?

A. I immediately fell.

Q. Which foot came into contact with the plastic?

A. The left.

Q. And did you fall to the skin?

[Page 29]

A. Yes.

Q. And what part of your body hit the plastic or skin first?

A. My left side.

* * * * *

Q. Did you try to catch yourself as you fell?

A. There was a container in front, you know, on the after end. And as I went down, I just put my hand up, and my left hand got caught underneath my body and bent my wrist back underneath the body.

* * * * *

[Page 30]

Q. When you went down, you said you landed on your left side?

A. Yes.

Excerpts from Deposition of Albert Howlett

Q. And your left hand or wrist, what happened to that?

A. It got caught underneath my body as I fell on it.

* * * * *

[Page 39]

Q. Was there any problem with lighting in the hold at the time of your accident?

A. Oh, yes. You have four drafts going out, you have three high containers on deck. Yes, it's pretty dark.

Q. Was it daylight?

A. Yes.

* * * * *

Q. At any time before you entered the hatch or before your accident did anyone mention the fact that there was plastic underneath the cocoa beans?

A. No.

Q. The plastic, was it damp or wet at all that you recall?

A. No.

Q. Were your clothes damp or wet when you got up?

A. No.

Q. You said you slipped on the plastic. What actually caused you to slip?

[Page 40]

A. I imagine the plastic itself or the debris on top of it. I

Excerpts from Deposition of Albert Howlett

don't know.

Q. You say "debris." Can you describe the debris.

A. You have cocoa beans, you have pieces of cocoa beans crumbled, you know, dust, dirt, rust, you know.

Q. And some of that was present on the plastic?

A. Yes.

Q. Normally, when you're unloading cocoa beans at other times, would thee be dust and rust and debris on the paper?

A. Yes.

Q. So that's a normal condition?

A. Yes.

* * * * *

[Page 43]

Q. So the area that was exposed was approximately 4 feet by 5 feet?

* * * * *

A. It would be roughly about 8 foot.

Q. Which way? 8 foot square?

A. 8 foot square.

Q. Do you know what actually caused you to fall?

Excerpts from Deposition of Albert Howlett

A. Yes, the plastic.

Q. Would you describe it as you slipped or you tripped?

A. I slipped.

Q. Are you saying that the plastic was slippery in some ways?

A. Yes.

Q. And would you say the plastic was more slippery than if paper was present there?

A. Definitely, yes.

Q. And why would it be more slippery than paper?

A. Because the paper will grab, it will grab the metal deck. You know, it will hold. Where if there's plywood underneath the paper, it will just hold that much better. The most that would happen is the paper would rip if you stepped on it, where the plastic won't -- you know, it doesn't give.

* * * * *

[Page 44]

Q. You've said you've never seen plastic used like that in a hold where cocoa beans are stowed. Have you ever heard of plastic being used in that situation?

A. No.

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

[Page 3]

Q. Would you state your full name please.

* * * * *

A. In my country I am referred to as Captain Cafena. Captain Caınpos, but here my name would be Cafena.

[Page 4]

Q. Cafena, thank you. Captain Cafena, back in July of 1989, were you employed by Empremar?

A. Affirmative, yes.

Q. In what position?

A. As a captain.

Q. On what ship?

A. PRESIDENTE IBANEZ.

* * * * *

[Page 6]

Q. Referring to the No. 2 Hold, do you recall whether there were cocoa beans loaded in the No. 2 Hold to the ship on that voyage?

[Page 7]

A. Not exactly.

Q. If cocoa beans were loaded on the ship on that voyage, at what port would they have been loaded, if you know?

A. I would say in Guayaquil.

Q. And what country is Guayaquil?

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

A. In Ecuador.

* * * * *

[Page 8]

Q. When in Guayaquil, who does the loading of the cargo? In Guayaquil, who does the loading of the cargo?

A. The stevedores.

* * * * *

Q. Who would have made the determination as to where on the ship the cocoa beans would be loaded?

[Page 9]

A. Who makes the decision to load the cargo?

Q. No. Who determines -- who makes up the stowage plan to determine where cargo will be loaded on the ship?

A. The pilot -- the chief mate.

* * * * *

Q. Do you review his stowage plan?

A. Always.

Q. When you arrived in Guayaquil, did you give the stowage plan to the agent or to the stevedore or who?

A. The chief mate would give it to the agency.

Q. When cocoa beans are loaded on the ship in Guayaquil, is paper or wood or plastic put on the deck on which the cocoa beans are put on top of?

* * * * *

[Page 10]

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

A. Always paper.

Q. Have you ever seen plastic put on the deck?

A. In any other occasion?

Q. On any occasion with loading the cocoa beans.

A. Never with cocoa beans. Never with cocoa beans. It is not permitted.

Q. Why is it not permitted?

A. Because the cocoa beans are a very delicate cargo, and they could breathe, and the plastic would -- they are very humid, moist, and the plastic could cause more moisture.

Q. Who makes the decision as to what is put on the deck before the cocoa beans are stowed?

A. The stevedores.

Q. How do you know that?

A. Because it has always been that way. They should know what they have to do, and that is their job.

Q. Now, does your chief mate watch the loading of the cargo?

A. I would say yes, that he would do it, but he can't be attentive to everything that is happening.

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

[Page 11]

Q. Would he be responsible to make sure they put paper on the deck and not plastic?

* * * * *

A. Yes.

Q. If plastic were placed on the deck, would it have been his duty to stop it and order it removed?

* * * * *

A. He would have to object immediately if he saw they were putting plastic when they were loading on the cocoa beans, of course, yes.

* * * * *

Q. What is your practice with respect to how many men from the ship's crew are on deck of the vessel watching the loading of cargo when the ship is in Guayaquil?

[Page 12]

A. Normally be three sailors and one guard, an official.

* * * * *

Q. Is it your practice to assign one seaman to watch each hold?

A. No, it's not the practice to assign one man for each cargo. Normally they are watching all the cargo on the ship.

Q. How many holds are on the ship or on the PRESIDENTE IBANEZ?

CAPTAIN CAFENA: Cuatro.

THE INTERPRETER: Okay. Four.

Q. So that would it be fair to say -- strike that. You have

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

three men, three seaman and a mate, an officer -- you have three seaman and an officer assigned to watch the four cargo holds?

* * * * *

[Page 13]

A. Yes. Because many strangers or strange people could enter. There could be people who were trying to stow away drugs or stowaways.

Q. And those men will move from hold to hold during the course of the whole cargo operation watching what is happening?

A. Affirmative. Yes.

Q. And that would start from the beginning -- from the time the longshoremen come on the ship until the longshoreman finish?

A. Yes.

Q. So that if sheets of plastic were being put on the deck for the -- before the cargo -- the cocoa beans were being loaded, they should be able to see that plastic being placed on the deck and stop it?

A. Yes.

* * * * *

[Page 14]

Q. Let me rephrase the question. When the ship was in Guayaquil in July of 1989, whatever the date, would the practice that you just described have been the practice that was followed on the ship?

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

* * * * *

A. The practice is this. To take care of the cargo and to make sure that no strange people come on the ship. Strangers.

Q. Would that have been the practice, to watch the cargo being loaded on the ship in Guayaquil, in July of 1989?

* * * * *

[Page 15]

A. Yes.

Q. So that if plastic was placed on the deck under the cocoa beans in Guayaquil in July of 1989, one of the crew members should have seen it?

* * * * *

A. Affirmative. And he would have advised me or one of the ship mates.

MR. WRIGHT: Chief mate.

THE INTERPRETER: Chief Mate. I'm sorry.

Q. And if you had been advised, you would have directed that it be removed?

A. Immediately.

* * * * *

Q. When the ship was in Philadelphia for discharging cargo -- or strike that. When the ship was in Philadelphia, did you have members of your crew on the deck to watch the work of the stevedores?

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

A. Yes, as it is the practice to have people.

Q. Was your practice in Philadelphia the same as your practice in Guayaquil?

* * * * *

[Page 16]

Q. In loading, unloading cocoa beans in Philadelphia in July of 1989, how many members of the crew would you have on deck -- did you have on deck observing the unloading operation?

[Page 17]

A. I had three sailors and one officer, watching not just the operation, but taking care of the whole ship.

Q. Going back to the loading of cocoa beans in Guayaquil, if plastic was placed on the deck underneath the cocoa beans, who would have ordered that plastic, if you know?

A. Who would have ordered to put the plastic?

Q. No. Yes first.

A. The stevedores.

Q. Who would have purchased the plastic?

A. The ship would buy the plastic. We purchase all of the materials for the operation. The plastic, the wood.

Q. Do you do the purchasing or does the agent do the purchasing?

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

A. The ship directly, but not in Guayaquil. We would buy it in the United States, because it is cheaper.

Q. Did you ever buy plastic for putting on decks in the course of -- for use in stowing cargo?

A. Yes, but to protect another type of cargo that would not be cocoa beans.

[Page 18]

Q. What kind of cargo?

A. Drums of corrosive chemicals.

Q. What kind of plastic do you buy?

A. Only the name would be polyprop --

MR. WRIGHT: Polypropylene.

Q. Does it come in rolls or sheets or what?

A. In rolls.

Q. How long are the rolls?

A. Thirty meters. Thirty, thirty-five meters.

Q. How wide is the roll?

A. About two meters.

* * * * *

Q. Where are the rolls of plastic kept on the ship?

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

A. The cuarto maestre.

* * * * *

[Page 19]

Q. Well, it's kept in a locker?

A. In a locker locked with a key. As the word says, locker.

Q. Would that be the bosun's locker?

A. Yes.

Q. He would be the one that would have the key to the locker?

A. Him and the chief mate.

* * * * *

Q. In stowing cocoa beans, was it the practice on the IBANEZ to always use paper on the deck?

A. First wood and then paper.

Q. Why wood and then paper?

A. So the paper would have a better resistance. If not, it would break.

[Page 20]

Q. Why do you put anything on the deck? Let me rephrase the question. Why do you put wood or paper on the deck underneath the cocoa beans?

A. Because that is the way that we should stow the cocoa beans.

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

Q. Do you know why you do it?

A. Why the stevedores?

Q. Yeah. Why paper is put on the deck regardless of who does it?

A. The stevedores put it, because that is the way to stow the beans.

Q. Do you know if the purpose of it is to protect the beans from coming in contact with moisture from the deck?

A. The paper is to protect against the moisture from the deck, exactly. Precisely.

Q. Who purchases the paper that is used on stowing cocoa beans in Guayaquil?

A. The boat has it. The boat purchases it the same as the plastic, in the United States.

[Page 21]

Q. Now, do they also use wood under the paper in Guayaquil in stowing cocoa beans?

A. Yes.

Q. And who purchases the wood?

A. Also the boat. That we would buy in Valparaiso, in Chili.

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

Q. Where is the paper stored on the ship before you get to Guayaquil?

A. In the same quartermaster.

Q. Locker. Same quartermaster locker?

CAPTAIN CAFENA: The same.

A. The same locker by the quartermaster.

Q. How about the wood?

A. The wood usually comes broken down in -- in the 'tween deck. They put it there so it will be protected from the rain.

Q. When the longshoremen in Guayaquil come aboard the ship and they need paper, how do they go about getting it?

A. They ask for it from the quartermaster or from the chief pilot, who would have it in his locker.

[Page 22]

MR. SOVEL: By chief pilot, does he mean chief mate?

CAPTAIN CAFENA: Chief mate.

* * * * *

Q. How about when they need the wood for storing cocoa beans, would they have to ask for it or just take it?

A. No. They always ask for it from the guard or from the

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

chief mate or the quartermaster.

Q. Is it correct that in Guayaquil the longshoremen do not bring on their own paper or own wood?

A. It's correct.

Q. And whatever they use -- is it correct that whatever they use under the cargo, they have to get from the ship?

* * * * *

[Page 23]

A. Affirmative.

* * * * *

Q. Is any cargo loaded in Guayaquil other than cocoa beans?

A. Bananas.

Excerpts from De Bene Esse Deposition of Captain Daniel Cafena Campos

[Page 5]

Q. Captain does that stowage plan indicate where dunnage or other similar materials, such as paper or plastic or whatever may be used, does it indicate where that material is to be placed within the cargo or under or over the cargo for that matter?

* * * * *

[Page 6]

A. (Captain Cafena) No.

* * * * *

[Page 7]

Excerpts from De Bene Esse Deposition of Captain Daniel Cafena Campos

Q. Who loads the cocoa beans -- strike that. Who loaded the cocoa beans in Guayaquil?

A. The Stevedores.

Q. Assuming that cocoa beans have been loaded on board the PRESIDENTE IBANEZ for the voyage in question, and those cocoa beans had been loaded in Guayaquil, who would have loaded those cocoa beans?

A. The stevedores.

Q. And, captain, who made the decisions concerning what, if anything, would be placed underneath that cargo of cocoa beans?

[Page 8]

A. The stevedores.

Q. . . . . Captain, have you ever observed cargo of cocoa beans loaded -- being loaded by stevedores?

A. Yes. By the stevedores, yes.

Q. And what, if anything, is normally placed underneath those -- that cargo of cocoa beans?

* * * * *

A. They put what they are supposed to put in this case, which would be wood and then paper.

Q. And then the cocoa beans are placed on top of the paper?

A. Always on the paper.

Excerpts from De Bene Esse Deposition of Captain Daniel Cafena Campos

Q. Have you ever seen a stevedore loading -- stevedore use plastic in the loading of cargo --

A. No.

Q. -- at all or just underneath the cargo?

[Page 9]

A. In this case, I have never seen a stevedore use plastic when loading cocoa beans. The ship mate would have ordered him to stop it immediately.

Q. Okay. We'll get to that in a second, captain. Have you ever seen plastic used in connection with the loading of other cargo on board a ship?

A. Affirmative.

Q. How about on board the PRESIDENTE IBANEZ?

A. Yes. But carrying, for example, in Houston, corrosive drums. IMO cargo.

* * * * *

Q. Now, captain, at any time during loading of cocoa beans in Guayaquil, were you ever aware that the stevedore was using plastic underneath the cocoa beans?

MR. SOVEL: And by that you mean him personally?

MR. WRIGHT: Yes.

A. Never.

* * * * *

Excerpts from De Bene Esse Deposition of Captain Daniel Cafena Campos

[Page 10]

Q. Captain, in 1989, did you have a practice for reporting problems that your officers or crew members might observe during the course of loading on board the PRESIDENTE IBANEZ?

A. I always had.

Q. And what was that practice?

A. To observe, to make sure that there would be no robberies and to protect the ship.

Q. What would be the practice if your officers or crew members observed a problem in the manner in which the cargo was being loaded?

A. They would advise me immediately. That is a practice.

Q. And if a stevedore in Guayaquil had placed plastic down on one of the 'tween decks on the PRESIDENTE IBANEZ and then placed a cargo consisting of cocoa beans on top of that plastic, is that something that would have been reported to you?

* * * * *

[Page 11]

A. Immediately.

Q. And why would that have -- why would that be something that would be reported to you?

* * * * *

A. Because it's not usual -- because you should not be plastic

with the cocoa beans.

Q. And, captain, why is plastic not ordinarily used in the loading of cocoa beans?

A. Because the plastic produces moisture and cocoa beans go bad with the moisture.

Q. Are you aware of any other problems arising from the use of plastic with cocoa beans?

A. Apart from the moisture, no.

* * * * *

[Page 13]

Q. Now, you testified that the longshoremen made the decision to put paper and wood underneath the cocoa beans?

[Page 14]

A. Affirmative.

Q. Isn't it correct that if they did not do that, you would require them to do that?

* * * * *

A. They have to do it.

Q. So the ship requires them to do that?

* * * * *

A. The stevedores have to fulfill their jobs. If not, the agency would throw them out.

Q. But they do not have authority to decide not to put the wood or paper under the cocoa beans, do they?

* * * * *

A. They have the decision to do it.

Q. Well, do they have -- do they have -- can they make a decision not to do it?

A. If they did it, it would not be correct.

Q. And what would you do?

A. This case has never happened to me.

Q. Would you -- if you learned that they were not doing it, would you not tell them to do it?

* * * * *

[Page 15]

A. I would have told them.

Q. And would you not have insisted that they do it?

* * * * *

A. Normally, we don't repeat the order. If I would have told them -- I've never had a case like this happen to me.

Q. Is what you are saying that if you tell them, they will do it?

A. Possibly they would do it.

Q. But when you said they made the decision to do it, do you mean that they could also make the decision not to do it?

* * * * *

Excerpts from De Bene Esse Deposition of Captain Daniel Cafena Campos

Q. Let me rephrase the question. When you stated before that the longshoremen made the decision to put wood and paper under the cocoa beans, by that do you mean that they also had authority to make the decision not to place wood and paper under cocoa beans?

* * * * *

[Page 16]

A. No. I don't believe they had it.

Excerpts from Deposition of Raymond McMullen

[Page 5]

Q. Could you state your full name?

A. Raymond McMullen.

* * * * *

[Page 7]

Q. How long have you worked as a longshoreman?

A. About 21, 22 years steady.

* * * * *

[Page 8]

Q. What's your position now?

A. Now I am a gang foreman.

Q. How long have you been a gang foreman?

A. About 13 years.

Q. Can you tell me briefly the job description of a gang

Excerpts from Deposition of Raymond McMullen

foreman?

A. Hire the right amount of men for whatever the job calls for, and to make sure the job gets done safe and as quick as possible.

* * * * *

Q. At other times, do you also act as a ship boss?

A. Yes, I do.

* * * * *

[Page 9]

Q. Can you tell me briefly what the duties of a ship boss are?

A. Basically the same as a hatch boss, make sure all the cargo gets on and off.

* * * * *

Q. Investigating an accident involving Albert Howlett, were you present on the day this accident occurred?

A. Yes.

* * * * *

[Page 10]

Q. Do you remember what your job was that day; were you acting as a ship boss that day?

A. Yes, I was.

* * * * *

[Page 13]

Q. How did you first find out that Mr. Howlett was involved in an accident?

A. I believe he came up to me and told me that he had hurt

Excerpts from Deposition of Raymond McMullen

himself.

Q. And where were you when he told you this?

A. I believe I was on the deck.

* * * * *

Q. Did you conduct any type of investigation, talk to anyone else who was in the hold, or anything else to find out what happened?

[Page 14]

A. I just looked down the hatch and seen plastic laying on the ground. I didn't talk to no one.

Q. This is after the accident, after you talked to Mr. Howlett, you looked down in and you saw plastic?

A. Yes.

Q. At any time before Mr. Howlett told you about his accident, did you look into the hold and see plastic?

A. No.

* * * * *

[Page 15]

Q. The plastic that you saw, can you describe it for me?

A. White, clear plastic.

Q. When you looked down, how much of the skin could you see?

[Page 16]

A. Right where they took the units out from.

Excerpts from Deposition of Raymond McMullen

Q. How many units had they taken directly from the skin?

A. I believe it was four, but I am not certain.

Q. Would that be one load, or is that four separate loads?

A. That would be one load.

* * * * *

[Page 22]

Q. As ship boss, you were also responsible for overseeing what was going on in the other hatches?

A. Yes.

Q. Do you know if there was plastic used in the other hatches?

A. I don't remember.

Excerpts from Deposition of Joseph Fisher

[Page 5]

Q. State your full name.

A. Joseph Fisher.

* * * * *

[Page 9]

Q. Where did Mr. Howlett's accident occur?

A. No. 2 hatch.

Q. Were you working in the hatch at the time?

Excerpts from Deposition of Joseph Fisher

A. Yes.

* * * * *

[Page 16]

Q. Do you know what caused him to fall?

A. The plastic.

Q. Was there anything besides the plastic there that contributed to causing him to fall? Were there any objects that he tripped on, or anything like that?

A. Probably dust and dirt from the cocoa beans.

* * * * *

Q. Prior to this day, had you ever seen plastic used in a hatch where cocoa beans were stowed?

[Page 17]

A. No.

Q. After this day, did you ever see plastic used in the hatch where cocoa beans were stowed?

A. No.

Q. Do you know if plastic was used in any other hatch aboard this vessel?

A. I don't know.

Q. Did you work at any other hatch?

A. Yes.

Q. And in those hatches, were there cocoa beans.

Excerpts from Deposition of Joseph Fisher

A. I don't remember.

* * * *

[Page 18]

Q. Before Mr. Howlett jumped off the cocoa beans into the exposed area, did you at any time look at that exposed area?

A. No.

[Page 19]

Q. When did you first realize there was plastic there?

A. When Sonny was on the deck.

Q. When you looked down at the exposed area, could you see the plastic?

A. I don't understand what you mean.

Q. After Mr. Howlett fell, did you go over to that area?

A. Yes.

Q. And when you looked down, you could see Mr. Howlett on the ground?

A. Yes.

Q. When you looked at the deck area, could you see plastic?

A. Yes.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
BIRKDALE SHIPPING	:	
CO., S.A.,	:	
Defendant.	:	NO. 91-7978

MEMORANDUM

J. M. Kelly, J. **OCTOBER 1, 1992**

Presently before this court is Defendant Birkdale Shipping Co.'s motion for summary judgment pursuant to Fed. R. Civ. P. 56. This court has jurisdiction over this matter under 28 U.S.C. § 1331 and § 1332.

This action arises out of the injury to Plaintiff, Albert Howlett, while discharging pre-slung cocoa beans from the No. 2 hold of the vessel M/V Presidente Ibanez. At the time of the incident the M/V Presidente Ibanez was owned and operated by Birkdale Shipping Co., S.A.[1] Plaintiff was employed as a longshoreman by Northern Shipping Co., a stevedore operating in the Port of Philadelphia.

---

[1] The operator of this vessel on the date of the alleged injury is in dispute. This court will not deal with this issue for purposes of this motion.

The alleged accident is said to have occurred on July 28, 1989. In the hours before the accident, Plaintiff and other longshoremen were working in the tween deck of the No. 2 hatch hooking up four or five drafts of pre-slung bags of cocoa beans. While the first draft of cocoa beans were being lifted out of the hatch, plaintiff allegedly stepped down to the deck, upon which he allegedly slipped and fell.

Plaintiff contends that covering the deck was a layer of plastic. Plaintiff claims that he was not aware of the plastic and believed the deck to be covered by paper. It is customary to place paper and/or plywood under cocoa beans to protect against condensation. It is not customary to use plastic as a substitute for this purpose. Plaintiff asserts that the defendant was negligent in providing the stevedore with plastic instead of the usual paper or wood and in neglecting to warn the longshoremen that plastic was being used to protect the beans from condensation.

Defendants move for summary judgment claiming that as a matter of law they owed no duty of care to plaintiff. Defendants allege that the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b), as amended in 1972, limits a shipowner's liability to acts of its own negligence and cannot be held liable for dangerous conditions arising from the acts of an independent stevedore.

Defendants claim that under Scindia Steam Navigation Ltd. v. De Los Santos 451 U.S. 156 (1981) and Derr v. Kawasaki Kisen, K.K., 835 F.2d 490 (3d Cir. 1987) a vessel owner owes no duty in supervising the work of a stevedore, nor can he be held liable for such parties acts of negligence. Furthermore, Defendant points out that while they were the source of the plastic they were not responsible for, nor were they aware, of its intended use. They also claim that even if

they were aware of the plastics intended use, this is not enough to impose liability. In order to be liable the shipowner would have to perform an act creating "an unreasonable risk of harm." Woods v. Partenreederei Ms. Yankee Clipper, 677 F. Supp. 46, 48 (D. Mass 1987). Defendant also asserts that regardless of their knowledge involving the use of the plastic, they were under no duty to warn as the condition was open and obvious.

In response Plaintiff asserts that there is sufficient evidence that Defendant had actual knowledge that the plastic was to be used in connection with the cocoa beans and that the condition was not "open and obvious", and therefore may be held liable.

Under Fed. R. Civ. P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id. at 255.

While the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Therefore, the party opposing the motion must come forward with "more than a mere scintilla of evidence in its favor" and "'cannot simply reassert factually unsupported allegations contained in its pleading.'" William v. Borough of West Chester, 891 F. 2d 458, 460 (3d Cir. 1989) (citing Anderson, 477 U.S. at 249 and 325).

The Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 901 et seq. defines the duty owed to longshoremen by vessels. The 1972 amendments to the Act reduced the liability of the shipowner and increased the opportunity to recover from the stevedore. Under the amendments, the shipowner could be held liable for his own negligence, but not the negligence of the stevedore. 33 U.S.C. § 905(b); Woods, 677 F. Supp. at 47.

Scindia, the leading case on the duty a shipowner owes to its stevedore, held that the "vessel owes the longshoremen a duty to exercise due care 'under the circumstances'." Woods at 47. This level of care requires the vessel to be in working order so that an experienced stevedore is able to safely perform cargo operations. Id.

In this case Plaintiff is claiming that Defendant breached the duty to warn. In order to satisfy this claim it is necessary for plaintiff to show that defendant had actual knowledge of the condition and that it was not open and obvious.

Plaintiff asserts no factual basis for the claim that the vessel had actual knowledge that the plastic was being used in stowage for the cocoa beans. Plaintiff infers knowledge since the vessel was the source of the plastic. This assertion does

not satisfy the standard of actual knowledge necessary to impose a breach of liability. As Defendant denotes, being the supplier of equipment does not necessarily imply knowledge of its intended purpose.

Secondly, Plaintiff asserts that Defendants knowledge can be found through the fact that Defendants crew were present during the loading of the cocoa beans. This assertion also does not satisfy the knowledge requirement. If it is true that the dangerous condition was apparent from the mere presence during the loading process, then it readily transpires that this was an open and obvious condition. Under Scindia, a shipowner is not liable for open and obvious conditions.

Plaintiffs have produced no evidence from which to find a genuine question of fact. Therefore, Defendant's Motion for Summary Judgment shall be GRANTED.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
BIRKDALE SHIPPING	:	
CO., S.A.,	:	
Defendant.	:	NO. 91-7978

ORDER

AND NOW, this 1st day of October, 1992, in consideration of Defendant's Motion for Summary Judgment, Plaintiff's Answer thereto, Defendant's Reply, as well as the foregoing Memorandum of Law, it is hereby ORDERED that Defendant's Motion for Summary Judgment is GRANTED.

BY THE COURT:

/s/ James McGirr Kelly

James McGirr Kelly, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
BIRKDALE SHIPPING	:	
CO., S.A.,	:	
Defendant.	:	NO. 91-7978

ORDER

Before the Honorable James McGirr Kelly

AND NOW, this 1st day of October, 1992, in accordance with the Court's Order of October 1, 1992,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of defendant Birkdale Shipping Co., S.A. and against plaintiff Albert Howlett.

BY THE COURT

ATTEST: /s/ Arlene L. Quinn

Arlene L. Quinn
Deputy Clerk

Civ 1 (8/80)

ENTERED: 10/2/92

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
BIRKDALE SHIPPING	:	
CO., S.A.,	:	
Defendant.	:	NO. 91-7978

MEMORANDUM

J. M. Kelly, J.

Presently before the court is Plaintiff Howlett's Motion for Reargument of the court's Order, dated October 1, 1992, granting Defendant Birkdale Shipping Company's Motion for Summary Judgment. For the following reasons, the motion will be denied.

Plaintiff filed a complaint against Empresa Maritima Howlett v. Empresa Maritima, 92cv4245, on July 22, 1992. This complaint was based on the same facts and circumstances as the present action. On November 10, 1992, an Order was issued by this court to consolidate the cases for all purposes.

Plaintiff Howlett does not specify what rule of Federal Civil Procedure or Local Rule of the United States District Court for the Eastern District of Pennsylvania he invokes for her motion. Nonetheless, "any kind of motion that draws into question the correctness of the district court judgment is considered to be a motion to alter or amend the judgment

under Civil Rule 59(e)." 16 Charles A. Wright & Kenneth A. Graham, Jr., Federal Practice and Procedure § 3950, at 364 n.7. The purpose of a motion for reconsideration is to correct errors of law or fact, or to present newly discovered evidence. Keene Corp. v. International Fidelity Insurance Co., 561 F.Supp. 656, 665 (N.D. Ill, 1983), aff'd, 735, F.2d 1367 (7th Cir. Ill., May 29, 1984) (No. 83-1492).

An order granting summary judgment was issued on October 1, 1992. The court found that actual knowledge could not be imputed to the vessel owner and that the accident occurred as the result of an open and obvious condition.

In support of the instant motion, Plaintiff asserts that there has been a misapplication of the law to the facts of the case. Plaintiff contests the courts' finding the condition to be open and obvious, as well as, the failure to impute actual knowledge on the vessel owner.

Plaintiff submits no new evidence in support of this motion. Additional law has been found to supports the courts findings in the original memorandum and order. See Trinidad Pimental v. Canadian Pacific Bulk Ship Service and M/V Fort Nanaimo, CV NO. G-89-162, (S.D. Tx. filed July 19, 1991). Finding the law to have been appropriately applied to the facts of the case, Plaintiff's motion for reargument shall be denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
BIRKDALE SHIPPING	:	
CO., S.A.,	:	
Defendant.	:	NO. 91-7978

ORDER

AND NOW, this 23rd day of November, 1992, in consideration of Plaintiff's Motion for Reargument, Defendant's Reply, Plaintiff's Response, thereto, Defendant's Supplemental Brief, as well as the foregoing Memorandum of Law, it is hereby ORDERED that Plaintiff's Motion for Reargument is DENIED.

BY THE COURT:

/s/ James McGirr Kelly
James McGirr Kelly, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-2943

ALBERT HOWLETT

V.

BIRKDALE SHIPPING CO., S.A.
(D.C. Civil No. 91-07978)

ALBERT HOWLETT

V.

EMPRESA MARITIMA DEL ESTADO
(D.C. Civil No. 91-04245)

Albert Howlett,
Appellant

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action Nos. 91-07978 & 91-04245)
District Judge: Honorable James McGirr Kelly

Argued June 21, 1993

BEFORE: STAPLETON, MANSMANN and HUTCHINSON,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court dated November 24, 1992, be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/S/ Walter K. Stapleton
Circuit Judge

ATTEST:

/S/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: June 30, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-2943

ALBERT HOWLETT

V.

BIRKDALE SHIPPING CO., S.A.
(D.C. Civil No. 91-07978)

ALBERT HOWLETT

V.

EMPRESA MARITIMA DEL ESTADO
(D.C. Civil No. 91-04245)

Albert Howlett,
Appellant

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS,
Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/S/ Walter K. Stapleton
Circuit Judge

Dated: July 30, 1993